IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.210 OF 1994.

1. Ishwar Namdeo Thite

2. Machindra Tukaram Thite
residents of Bacheri,
Tal :Malshiras,
Dist : Solapur. .. Appellant
(Original defendants)

vs.

1. Shiva Appa Shinde

2. Mahadeo Appa Shinde,

both through Power of Attorney
Holder - Ankush Shiva Shinde,
Res. of Bacheri,
Tal: Malshiras,
Dist : Solapur. .. Respondents.
(Original plaintiffs)

A.M.Kulkarni. Advocate for the Appellant.

Mr.Sanjay Thokade, Advocate for the Respondent Nos.1 and 2.

CORAM : S.R.SATHE, J.

DATED : 27TH AUGUST, 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order

passed by the Court of Additional District Judge, Pandharpur in Civil Appeal No.118 of 1990 whereby the order passed by the Court of Civil Judge, Junior Division, Malshiras, in Regular Civil Suit No.368 of 1988 dismissing the plaintiffs suit was set aside and the appeal was allowed and defendant was directed to deliver possession of the encroached land admeasuring 13 gunthas, the original defendants have preferred this second appeal. (For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendant).

2. Brief facts giving rise to the present appeal are as under :

. That the agricultural land bearing block no.126 described in detail in para 1 of the plaint is owned by the plaintiffs. To the south of the land there is land owned by the defendants which is bearing block no.125/1 and 125/2. In between plaintiffs and defendants land there is bund. According to plaintiff, sometime in the year 1987 the defendant started causing damage to the said

bund. He infact started to break the said bund and thereby caused encroachment on the plaintiffs land. When the plaintiff asked about the same to the defendant he asked the plaintiff to get the land measured. The plaintiff, therefore, submitted an application for measurement of the suit land. Accordingly measurement took place on 16.6.1988 and in pursuance of the said measurement boundary marks were fixed on 20.7.1988. During the said measurement it transpired that the defendant had made an encroachment to the extent of 13 R. in the plaintiffs land. The plaintiff, therefore, asked the defendant to hand over the possession of the encroached land. According to the plaintiff, the defendant avoided to deliver the possession. Hence the plaintiff filed the present suit on 31.8.1988 for possession of the suit premises and also claimed damages towards mense profit for one year.

. The defendant filed their written statement at exhibit 10 and opposed the suit claim. They contended that the suit land described in para 1 of the plaint is not

exclusively owned by the plaintiffs. The defendants also denied that they have made any encroachment in plaintiffs land. They also denied the allegation that the land in question was measured on 16.8.1988. The defendants therefore contended that the land in question is in their possession since their ancestors, that is since the year 1960. According to them plaintiffs father Appa Dhulaji Shinde's wife Godabai was from the defendants family. She had received certain land from her father and the same was standing in the name of the plaintiff. Adjacent to the plaintiffs land, there was land bearing survey no.44/3 which was standing in the name of Jagu Thitte. He sold the property for Rs.500/- to plaintiffs father Appa Dhulaji Shinde and defendants father Tukaram Thite. The consideration of the said sale deed was paid by them equally. However, as a result of the provisions of the Prevention of Fragmentation and Consolidation of Holdings Act, it was not possible to divide the said land and as such the entire land was kept in possession of the plaintiffs father Appa and in view of the same land

admeasuring about 12 to 13 Gunthas was given by plaintiff to Tukaram Namdeo Thite i.e. the plaintiffs father and since then this land was in their possession. Thus, according to the defendants they were in possession of the suit land openly, peacefully and continously as owner since the year 1960. They, therefore, contended that plaintiffs have no right, title and interest in the suit property and they are not entitled to get the possession. Hence on these grounds they prayed for dismissal of the suit.

. On these pleadings the trial Court framed issues at exhibit 11 and after considering the evidence on record came to the conclusion that plaintiffs have failed to prove the alleged encroachment and as such dismissed the plaintiffs suit. Being aggrieved by the same the plaintiff filed Civil Appeal. However, the first appellate court came to the conclusion that the plaintiff has proved the encroachment and the contention of the defendants regarding acquisition of title by adverse possession is not proved. The Appellate Court, therefore, set aside the order passed by

the trial court and decreed the plaintiffs suit.

3. The defendants have challenged the above mentioned order of the first appellate court in this second appeal. From the perusal of the record it appears that on 19.4.1994 at the time of admission this court passed the following order "The question regarding the status of the appellant and legal effect of the title, though held to be only possessory will require consideration. Admit."

4. In this second appeal before me the learned Advocate for the Appellant/defendants has argued two points. Firstly he submitted that the first appellate court has wrongly relied on the map exhibit 26 though it was not properly proved and came to the conclusion that the plaintiff has proved the alleged encroachment. Secondly, he canvassed before me that the defendants are in possession of the suit land since the year 1960 and their possession is adverse to the plaintiff and as such the defendants have become the owners by adverse possession. He, therefore, submitted

that the plaintiffs are not entitled to get the possession of the suit land. As against this, Shri Thokade, learned Advocate for the Plaintiff supported the judgment and order passed by the first appellate court and also submitted that in this matter there is infact no substantial question of law involved and as such there is no necessity to interfere with the finding recorded by the first appellate court.

5. From the perusal of the written statement, exhibit 10 we find that the defendants have infact admitted that the land bearing block no.126 is owned by the plaintiff and to the south of the said land there is land of the defendants. Not only that, but it is pertinent to note that the defendants have made the following averment in the written statement "

(though the said land is shown as part of block no.126, the same is actually in possession of the

defendants as owner openly and continuously and as such plaintiffs have no right in the same). Besides this at another place they have also averred "

(The encroached land may be standing in the name of plaintiff, but the defendant is in possession of the land as owner) Thus it appears that in this matter it is infact admitted by the defendants that the alleged encroached portion forms part and parcel of block no.126 which is admittedly owned by the plaintiffs.

6. Once it is said that the alleged encroached portion is forming part and parcel of the plaintiffs property and at present the same is in possession of the defendant then normally there should not be any hurdle in granting decree for possession. Now, it is the case of the defendants that the suit land is in their possession since the year 1960 and they are in enjoyment of the same as owner openly and continuously and as such

the plaintiff are not entitled to seek possession. Thus, though in the pleadings it is not specifically stated that the defendants have become owners by adverse possession, an attempt is made to show that they acquired title by adverse possession. It is needless to say that the burden obviously lies on the defendant to show the adverse possession and establish that all the essential ingredient of adverse possession are fullfilled in the instant case. Usually, the adverse possession will not be informed when initially there is a permissive possession. In the instant case we find that it is the contention of the defendants that as particular land was not possible to be divided the plaintiffs gave about 13 gunthas land to them. So, in a way it is suggested that the plaintiffs had infact permitted the defendants to be in possession of the suit land as owner. However, firstly it must be noted that though the defendants have contended that plaintiff had accordingly given the land to them besides the bare word of defendant there is absolutely no other convincing evidence to show that the plaintiffs had infact given the land out

of their block no.126 to the defendants. If really such thing would have happened then normally the defendant would have obtained some document to that effect, but that has not happened. Not only that , we find that they also did not make any application to the concerned authorities for entering their names in respect of that particular portion of land, atleast in the column of **kul and wahiwat.** Besides this, though it is alleged that they are accordingly in possession since the year 1960, there is no cogent evidence to show that the defendants are actually in possession since that year. The plaintiff has, on the contrary, stated that the said land has been encroached by the defendant sometime in the year 1987 by breaking bunds in between the plaintiffs land and the defendants land. So it appears that the defendants have infact failed to prove that the land was in their possession since the year 1960.

7. The learned Advocate for the defendant has placed reliance on the case State of West Bengal Vs. The Dalhousie Institute Society, AIR 1970 SC

1778 wherein their Lordship have observed that " Though possession was given from the basis of a grant as the said grant was invalid, person in such possession acquired title by adverse possession." Similarly, he has also placed reliance on the case Bondar Singh vs. Nihal Singh (2003) 4 Supreme Court Cases 161, wherein it was held that unstamped and unregistered sale deed, though it is not conveying title to the vendor and not admissible in the evidence it can be looked into for the collateral purpose . Firstly, it must be noted that in the instant case admittedly there is not even a single document to show that the plaintiffs had infact permitted the defendant to occupy the suit property, leave aside the question whether the said document is legal or not. Infact, it appears that the case of the defendant is that orally the plaintiffs allowed the defendants to remain in possession of the land in question. However, it must be noted that in the instant case there is no sufficient evidence to show that the defendants were infact in possession for a statutory period and that they had an animus to hold the land adversely to the

plaintiff. When such animus or hostile attitude is lacking then possession however long it may be, may not be regarded as adverse possession. As against this, the learned advocate for the respondent has placed reliance on a case, The State Bank of Travancore vs. Arvindan Kunju Panicker & ors AIR 1971 Supreme Court 996 wherein their Lorships have observed that the permissible possession cannot be converted into adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of the true owners for a period of twelve years or more. It appears that the first appellate court has recorded the finding that the defendants have failed to establish the adverse title as alleged. The finding recorded by the First Appellate court can not be said to be illegal or incorrect and as such there is no necessity to interfere with the same.

8. The plaintiff has examined himself and has also examined the surveyor who measured the land in question. He has categorically stated that at the time of measurement it was noticed that the

adjacent owners namely the defendants had made encroachment of 13 R. in plaintiffs land bearing no.126. The first appellate court rightly accepted the evidence with regard to the cadastral surveyor and observed that the plaintiffs have proved the alleged encroachment and therefore decreed the plaintiffs suit.

9. In view of above, it is very clear that there is no substance in this appeal. The appeal is dismissed with costs.

. The defendants to deliver the possession of the suit land to plaintiffs by 30.09.2004.

. C.C.expedited.